SPHERE DRAKE

MINUTE ENTRY
HEEBE, J.
DECEMBER 28, 1992

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CLERK

SPHERE DRAKE INSURANCE plc — CIVIL ACTION

VERSUS — NO. 92-2058

MARINE TOWING, INC.,
ST. JUDE MARINE SERVICE, INC.,
MOOSE TOWING, INC.,
RIVERSIDE MARITIME ENTERPRISES, INC.,
BRASS MARINE, INC., AND
CHARLES ARNOLD — SECTION "B" (6)

This cause came on for hearing on a previous day on the motion of defendants, Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and Marine Towing, Inc., to dismiss the petition for order to compel arbitration and for stay of litigation filed in this proceeding by plaintiff, Sphere Drake Insurance plc.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendants, Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and Marine Towing, Inc., to dismiss the petition for order to compel arbitration and for stay of litigation, be, and the same is hereby DENIED.

REASONS

On April 7, 1992, Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and Marine Towing, Inc. (hereinafter "Marine Towing") commenced suit against Sphere Drake Insurance plc, among others, in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, to obtain a declaration that the policy of Protection and Indemnity Insurance (hereinafter "P & I policy") issued by Sphere Drake to Marine Towing provided coverage for the loss of the M/V ST. JUDE, and the death of four crewmen, in the Mississippi River on March 14, 1992. The parties requested coverage under Sphere Drake policy wording SD 350, Class 1, which specifically includes an arbitration clause. Marine Towing also sought to recover damages and statutory penalties for the refusal of Sphere Drake to honor its obligations under the policy.

On May 1, 1992, purportedly in compliance with The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (hereinafter "the Convention"), 21 U.S.T. 2517, T.I.A.S. No. 6997, codified as 9 U.S.C. §§ 201, et seq., Sphere Drake unilaterally filed a Notice of Removal of the state court action. The Notice of Removal did not join the other defendants to the state court proceeding, Schade & Company, Inc., Eric Schade, Alfred Schade, and the ABC Insurance Company. After removal, the case was docketed in this Court as Civil Action No. 92-1509, under the caption "Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and

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Marine Towing, Inc. v. Sphere Drake Insurance PLC, Schade & Company, Inc., Eric Schade, Alfred Schade, and ABC Insurance Company" (hereinafter the "Removal Action"). Sphere Drake then filed a motion in the Removal Action to compel arbitration.

In part because Sphere Drake failed to join all state court defendants in its Notice of Removal, as required by 9 U.S.C. § 205 and 28 U.S.C. § 1441(a), Marine Towing moved to remand the Removal Action to state court on May 29, 1992. Defendants, Eric Schade, Alfred Schade, and Schade & Company, Inc., filed a motion to remand on June 1, 1992. In an order dated November 18, 1992, this Court granted both plaintiffs' and defendants' motions to remand. In an order dated November 19, 1992, this Court stated that Sphere Drake's motion to compel arbitration in Civil Action 92-1509 had been rendered moot by this Court's decision on the motions to remand.

On June 16, 1992, Sphere Drake filed a petition to compel arbitration and for stay of litigation and commenced this proceeding, Civil Action No. 92-2058. Sphere Drake's petition to compel arbitration seeks no additional relief beyond that sought in its motion to compel arbitration filed in Civil Action No. 92-1509. Sphere Drake seeks the enforcement of a purported agreement to arbitrate contained in pre-printed form provisions of its policy, provisions that Marine Towing contends were not brought to its attention until after the sinking of the M/V ST. JUDE. Defendants filed the motion at issue, to dismiss Sphere Drake's petition to compel arbitration and for stay of litigation, on the grounds that

this Court lacks subject matter jurisdiction and that the petition fails to state a cause of action.

In filing the petition to compel arbitration and to stay litigation in this Court, Sphere Drake contended that the enabling legislation in 9 U.S.C. § 201 et seq., provides this Court with subject matter jurisdiction, pursuant to 28 U.S.C. § 1331. There are two relevant provisions which determine whether this Court in fact has subject matter jurisdiction. First, 9 U.S.C. § 203 provides: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." Applying 28 U.S.C. § 1331, if an action falls under the Convention, the federal courts have subject matter jurisdiction. Another provision, 9 U.S.C. § 202, aids in determining whether an action falls under the Convention: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention."

Sphere Drake cites Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co. (Pemex), 767 F.2d 1140, 1144-45 (5th Cir. 1985), for the rule that a district court has subject matter jurisdiction in a case under the Convention where: (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a Convention signatory; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen. Sphere Drake

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accurately points out that the first factor is the only factor in dispute. This Court must therefore determine whether there is an agreement in writing to arbitrate the dispute; if there is, then under 9 U.S.C. §§201, et seq., and Sadco, Inc., the Convention applies and this Court has subject matter jurisdiction.

Article II(2) provides the only clarification as to what qualifies as an "agreement in writing":

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telexes. (emphasis added)

Thus, under Article II(2) of the Convention, this Court finds that there is an agreement in writing if there is either (1) an arbitral clause in a contract; or (2) an arbitration agreement signed by the parties; or (3) an arbitration agreement contained in an exchange of letters or telexes.

Both parties admit that the insurance policy at issue, SD 350, Class 1, incorporates an arbitration provision, Clauses 51-52, p. A-11; they disagree as to its enforceability. Defendants contend that the arbitration provision does not constitute an agreement in writing, or, in the alternative, is not valid, so that the Convention does not apply and this Court does not have subject matter jurisdiction. Defendants contend that the insurance policy, which contains the arbitration provision, is certainly not a writing signed by the parties. Defendants also argue that there are no letters or telegrams concerning the arbitration provision. Therefore, defendants claim, there is no "agreement in writing" between the parties. Defendants do not acknowledge that a valid

arbitral clause in a contract is enough to satisfy the requirement that there be an agreement in writing.

Sphere Drake agrees that the arbitration provision must be in writing, but emphasizes that the writing need not be signed by the parties. Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987). In opposition to Marine Towing's argument that there was no exchange of letters or telexes evidencing an arbitration agreement, Sphere Drake argues that there was an exchange of correspondence between Sphere Drake and Marine Towing which constitutes an agreement in writing. Sphere Drake submits that Marine Towing's broker made a written offer (the "slip"). That slip requested coverage under the Sphere Drake policy wording SD 350, Class 1, which contains an arbitration agreement. Sphere Drake contends that its representative accepted the offer by stamping with Sphere Drake's seal, initialling, marking the slip as "bound," and delivering the signed policy to Marine Towing's broker.

Commenting on the enforceability of any arbitration provision, the Fifth Circuit stated: "Absent allegations of fraud in the inducement of the arbitration clause itself, arbitration must proceed when an arbitration clause on its face appears broad enough to encompass the party's claims." Sadco, 767 F.2d at 1148 (citations omitted). While defendants allege that they were unaware of the arbitration clause at the time they obtained the insurance policy, defendants do not allege that they were fraudulently induced into obtaining insurance coverage from Sphere

Drake. In addition, defendants do not allege that the arbitration clause is not broad enough to mandate arbitration in the situation at hand. Rather, defendants argue simply that they are not bound by the arbitration provision because they did not know that it was in the insurance policy until the dispute at hand arose.

Accordingly, this Court finds that the arbitration provision in clauses 51-52 of the insurance policy is valid and constitutes an agreement in writing between the parties. Consequently, the Convention is applicable and this Court has subject matter jurisdiction.

This Court need not delve into the question of whether there was an agreement in writing as set forth in (2) or (3) above. However, since the parties argued at length about whether there was an agreement in writing under (2) or (3), this Court will address those arguments.

In Genesco, the Second Circuit said that while the contract containing the arbitration provision must be in writing, it need not be signed by the parties. Id. at 846. The Second Circuit relied upon 9 U.S.C. § 3 for that proposition, which simply requires an "agreement in writing," but does not explain that term any further. The Tenth Circuit is in accord with the Second Circuit on this issue; the Tenth Circuit held that the arbitration provision must be in writing, but that it need not be a simple integrated writing and it need not be signed by the parties. Medical Development Corp. v. Industrial Molding Corp., 479 F.2d 345, 348 (10th Cir. 1973).

Genesco follows a line of cases in the second circuit in which the appellate court has held that a signature is not required. E.g., McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980); Fiaser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960). In addition, the district courts in the second circuit have followed the appellate court's holdings on this issue. See, e.g., Creative Secur. Corp. v. Bear Stearns & Co., 671 F.Supp. 961, 963 n.2 (S.D.N.Y. 1987), aff'd, 847 F.2d 834 (2d Cir. 1988); Ocean Industries, Inc. v. Soros Associates International, Inc., 328 F.Supp. 944, 947 (S.D.N.Y. 1971).

This Court was not directed to any cases, nor did it locate any on its own, in which a court held that a signature is required in order for an arbitration provision to be binding. The Fifth Circuit has not addressed the issue of whether a signature is required in order for an arbitration provision to be binding. While this Court is not bound by the Second and Eighth Circuits' decisions on this issue, their holdings do provide persuasive authority. In the absence of contrary authority, this Court finds that the arbitration agreement need not be signed; however, the arbitration agreement must be contained in a writing.

The issue, then, is whether the marked slip constitutes a written agreement. In Medical Development Corp., the Tenth Circuit said that the arbitration clause must be in writing, although it need not be signed by the parties. 479 F.2d at 348. The writing in that case consisted of two purchase orders by the plaintiff and a written confirmation from the defendant. Id. at 347-48. At the

bottom of the front page of the confirmation sheet was a statement that the parties are bound by the terms and conditions on the back of the sheet. There was an arbitration clause on the reverse side of the sheet. The parties did not sign the confirmation sheet. The Tenth Circuit reversed the district court's grant of a permanent injunction against arbitration, finding that the district court's findings were not sufficiently detailed to permit an intelligent review. Id. at 349. The appellate court emphasized that the district court had ruled that an earlier exchange of documents exactly like the ones at issue had been found arbitrable and that the district court's rulings were therefore inconsistent. Id. at 348-49.

This Court finds that the slips submitted by Marine Towing's broker and marked by Sphere Drake satisfy the writing requirement. Thus, this Court agrees with Sphere Drake that the arbitration provision in the insurance policy is an arbitration agreement contained in an exchange of letters and telexes and therefore qualifies as an agreement in writing. This finding provides a second ground for this Court's earlier ruling that the Convention is applicable and this Court has subject matter jurisdiction.

Defendants' second basis for its motion to dismiss is that Sphere Drake does not have a cause of action because there is no arbitration agreement on which to base its claim. The Court necessarily addressed and disposed of that argument above, in determining that this Court has subject matter jurisdiction in this case. As stated above, the Court finds that the arbitration

provision in the insurance policy constitutes an agreement in writing which is enforceable under the Convention. Therefore, Sphere Drake's petition for order to compel arbitration and for stay of litigation states a cause of action.

Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendants, Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and Marine Towing, Inc., to dismiss the petition for order to compel arbitration and for stay of litigation, be, and the same is hereby DENIED.

Frederick J. R. Heebe
UNITED STATES DISTRICT JUDGE

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PLOWMAN

TICK ACTION REQUIRED:
✓ Send for Reporting
✓ Send to Info-One

SUPREME COURT OF VICTORIA

CAUSES

No. 7371 of 1992

THE HONOURABLE SIDNEY JAMES PLOWMAN
(The Minister for Energy and Minerals) Plaintiff

v.

ESSO AUSTRALIA RESOURCES LTD. First Defendant

BHP PETROLEUM (NORTH WEST SHELF) PTY. LTD. Second Defendant

BHP PETROLEUM (BASS STRAIT) PTY. LTD. Third Defendant

THE GAS AND FUEL CORPORATION OF VICTORIA Fourth Defendant

THE STATE ELECTRICITY COMMISSION OF VICTORIA Fifth Defendant

JUDGE: MARKS, J.

WHERE HELD: MELBOURNE

DATES OF HEARING: 16-20 NOVEMBER 1992

DATE OF JUDGMENT: 8 DECEMBER 1992

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr. D. Graham, Q.C. with Mr. D. Maclean	Victorian Government Solicitor
For the 1st, 2nd and 3rd Defendants	Mr. R.McK. Robson Q.C. with Mr. S. O'Bryan	Middletons Moore & Bevins
For the 4th Defendant	Dr. I.C.F. Spry Q.C., Dr.J.McL.Emmerson Q.C. with Mr.P.J. Kennon	Mr. C.P. Devlin, Solicitor to the Gas and Fuel Corporation
For the 5th Defendant	Dr. P. Buchanan Q.C. Mr. R. Macaw Q.C. with Mr. P. Jopling	Freehill Hollingdale & Page